(1)

Supreme Court, U.S.
FILED

971244 JAN 29 1998

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GIBBS INTERNATIONAL, INC.
f/k/a GIBBS TEXTILES, INC.,
Petitioner,

v.

INTERNAL REVENUE SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Erik P. Doerring
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, SC 29211
(803) 799-9800

Counsel for Petitioner

January 26, 1998

33 pp

QUESTION PRESENTED

I. Did the district court and the court of appeals err in refusing to order the IRS to disclose the documents at issue under the Freedom of Information Act (FOIA)?

A. Was the district court required to review de novo the IRS' claims that the documents at issue were exempt from disclosure under FOIA?

B. Did the district court fail to properly apply the correct standard of review to the IRS' refusal to disclose the documents at issue under FOIA?

PARTIES TO PROCEEDINGS

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that all of its stock is owned by one individual. Further, Petitioner states that it owns all of the stock of each of its subsidiaries.

Respondent is the Internal Revenue Service, an agency of the United States Government.

TABLE OF CONTENTS

QUESTION PRESENTED . . . . . -i-

PARTIES TO PROCEEDINGS . . . . . -ii-

TABLE OF CONTENTS . . . . . -iii-

TABLE OF AUTHORITIES . . . . . -iv-

OPINIONS BELOW . . . . . -2-

BASIS FOR JURISDICTION . . . . . -2-

STATUTORY PROVISIONS INVOLVED . . . . . -2-

STATEMENT OF THE CASE . . . . . -4-
Statement of Facts . . . . . -4-
Statement of Procedural History . . . . . -6-

REASONS FOR GRANTING PETITION . . . . . -8-
I. The Application of 26 U.S.C.A. § 6103(e)(7) by the Fourth Circuit is in Conflict with the Majority of Circuit Courts to have Considered this Issue. . -8-
II. The Decision of the Court of Appeals is Erroneous. . . . . -10-
III. The Question Presented is Important. -13-

CONCLUSION . . . . . -15-

TABLE OF AUTHORITIES

Statutes

5 U.S.C.A. § 552 (West 1997) . . . . . -4-

5 U.S.C.A. § 552(a)(4)(B) (West 1997) -6-, -11-, -12-, -14-

5 U.S.C.A. § 552(b)(3) (West 1997) . . . . . -4-, -11-

13 U.S.C.A. §§ 8-9 (West 1990 & Supp. 1997) . . -14-

26 U.S.C.A. § 6103(e)(7) (West Supp. 1997) . -4-, -8-, -9-, -10-, -11-, -12-, -13-, -14-

26 U.S.C.A. § 6110(l) (West Supp. 1997) . . . . . -12-

42 U.S.C.A. § 2011 (West 1994) . . . . . -14-

42 U.S.C.A. § 2167 (West 1994) . . . . . -14-

Cases

Aronson v. Internal Revenue Service, 973 F.2d 962 (1st Cir. 1992) . . . . . -9-, -12-

Baldrige v. Shapiro, 455 U.S. 345 (1982) . . . . . -14-

Barney v. Internal Revenue Service, 618 F.2d 1268 (8th Cir. 1980) . . . . . -9-

Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224 (1st Cir. 1994) . . . . . -14-

Church of Scientology of Cal. v. Internal Revenue Service, 792 F.2d 146 (D.C. Cir), aff'd on a separate issue, 792 F.2d 153 (D.C. Cir. 1986) (en banc), aff'd 484 U.S. 9 (1987) . . . . . -8-, -10-, -12-

Currie v. Internal Revenue Service, 704 F.2d 523 (11th Cir. 1983) . . . . . -9-

De Salvo v. Internal Revenue Service, 861 F.2d 1217 (10th Cir. 1988) . . . . . -8-

Grasso v. Internal Revenue Service, 785 F.2d 70 (3rd Cir. 1986) . . . . . -8-

King v. Internal Revenue Service, 688 F.2d 488 (7th Cir. 1982) . . . . . -9-

Linsteadt v. Internal Revenue Service, 729 F.2d 998 (5th Cir. 1984) . . . . . -9-

Long v. United States, 742 F.2d 1173 (9th Cir. 1984) . . . . . -8-, -11-

N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) . . . . . -13-

United States Dep't of Justice v. Julian, 486 U.S. 1 (1988) . . . . . -13-

United States Dep't of Justice v. Landano, 508 U.S. 165 (1993) . . . . . -13-

Virginia Sunshine Alliance v. Nuclear Regulatory Comm'n, 509 F.Supp. 863 (D. D.C.), aff'd 669 F.2d 788 (D.C. 1981) . . . . . -14-

White v. Internal Revenue Service, 707 F.2d 897 (6th Cir. 1983) . . . . . -9-

Other Authorities

Fed. R. Crim. P. 6(e) . . . . . -14-

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GIBBS INTERNATIONAL, INC.
f/k/a GIBBS TEXTILES, INC.,
Petitioner,

v.

INTERNAL REVENUE SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Gibbs International, Inc. ("Gibbs") respectfully requests that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on November 7, 1997.

OPINIONS BELOW

The decision of the District Court granting summary judgment to the Government and the denial of the Motion for Reconsideration or Clarification, No. 7:96-996-13, were both unpublished and are included in the Appendix. See App. A-1; App. A-3. The decision of the Fourth Circuit, No. 96-2790, also was unpublished and is included in the Appendix. See App. A-4.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered a final judgment in this case on November 7, 1997. This Court is granted jurisdiction to review the judgment of the court of appeals by 28 U.S.C.A. § 1254(1). Pursuant to Rule 29.4(a), service of this Petition for Writ of Certiorari has been made on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave, N.W., Washington DC 20530.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C.A. § 552(a)(3) (West 1997):

> [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in

> accordance with published rules ..., shall make the records promptly available to any person.

The Freedom of Information Act, 5 U.S.C.A. § 552(a)(4)(B) (West 1997):

> [In a claim brought for the production of records] the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of [the Freedom of Information Act] ....

The Freedom of Information Act, 5 U.S.C.A. § 552(b)(3) (West 1997):

> [FOIA] does not apply to matters that are ... specifically exempted from disclosure by statute (other than [5 U.S.C.A. § 552b]) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The Internal Revenue Code of 1986, as amended, 26 U.S.C.A. § 6103(e)(7) (West Supp. 1997):

> Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

STATEMENT OF THE CASE

This case involves a request for disclosure of information by the Internal Revenue Service (the "IRS") under the Freedom of Information Act, 5 U.S.C.A. § 552(a)(3) (West 1997) ("FOIA"). Specifically, the IRS maintains that Government records requested by Gibbs are exempt from disclosure pursuant to exemption three of FOIA, 5 U.S.C.A. § 552(b)(3), in conjunction with 26 U.S.C.A. § 6103(e)(7) (West Supp. 1997) ("section 6103"). See Affidavit of Stephen Flesner, App. A-7 to A-10 (the "Flesner Affidavit").

Statement of Facts

The IRS initiated a civil tax audit of Gibbs in February 1994, focusing on general tax and accounting issues involved in the taxpayer's business. The IRS also reviewed certain international transactions conducted between Gibbs and its wholly-owned German

subsidiary, Gibbs GmbH. At no time during the examination did the IRS make any adjustments for or otherwise raise allegations of fraud or illegal conduct by Gibbs.

On December 15, 1995, approximately one year and nine months after the IRS audit began, German Tax Officials conducted a raid and seized the business records of Gibbs GmbH. The German Tax Officials did not communicate with Gibbs or otherwise announce their intentions prior to raiding the facilities of Gibbs GmbH. The business records were taken without the consent or permission of either Gibbs or Gibbs GmbH, and no explanation was ever provided by the German Tax Officials for the seizure. Then--again without any explanation--the German Tax Officials returned the business records seized from Gibbs GmbH on February 26, 1996. The German Tax Officials did not take any additional records, explain what they were searching for, or otherwise communicate the purpose for the seizure. Shortly afterward, in March 1996, the IRS completed its audit and proposed certain adjustments to Gibbs' books and records.

As a result of this series of events, Gibbs became concerned that the IRS communicated confidential--and possibly false or inaccurate--tax information regarding Gibbs and Gibbs GmbH to German Tax Authorities. consequently, Gibbs filed a request under FOIA. The IRS denied the request, claiming that all pertinent records were exempt from disclosure based upon the provisions of a tax treaty between the United States and Germany. See J.A. 16-17. After the IRS denied the

request to disclose the documents, Gibbs instituted this action pursuant to 5 U.S.C.A. § 552(a)(4)(B) (West 1997) to enforce its rights under FOIA.

Statement of Procedural History

Before the district court, the IRS identified only five pages of documents that were responsive to Gibbs' request. Flesner Affidavit, App. A-7 to A-10. The IRS explained its justification for failing to disclose the responsive documents as follows:

> [T]he release of references to information provided to or requested from a tax treaty partner, which was compiled by the IRS with respect to the potential tax liability of [Gibbs], would chill the future cooperation of foreign governments and tax treaty partners. ... If treaty partners were to cease or limit their cooperation with respect to exchanges of information, so that information they provided would not exist in IRS files that might be subject to a FOIA request, the IRS would be severely hampered in its ... enforcement capabilities under the Internal Revenue Code. Consequently, disclosure ... of the documents provided to a foreign Competent Authority would seriously impair Federal tax administration.

Flesner Affidavit, App. A-9 to A-10. After reviewing the responsive documents in camera, the district court issued a short, written order granting summary judgment in favor of the IRS:

> After reviewing the documents submitted for in camera review as a result of oral arguments heard September 24, 1996, I conclude that the Internal Revenue Service did not act arbitrarily or in violation of law in refusing to release documents pursuant to the Freedom of Information Act, (FOIA). The documents refer to information exchanged pursuant to a tax treaty. The Internal Revenue Service reasonably concluded that the disclosure of the documents would chill future cooperation with foreign government treaty partners and that these documents fall within the FOIA exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(e)(7).

Order Granting Summary Judgment, App. A-1.

Following the later denial of Gibbs' Motion for Reconsideration, see App. A-3, Gibbs filed an appeal with the United States Court of Appeals for the Fourth Circuit. Judgment was entered against Gibbs by the Fourth Circuit on November 7, 1997 in an unpublished, per curiam opinion that found "no error in the district court's decision." App. A-6.

REASONS FOR GRANTING PETITION

The decision of the Fourth Circuit in this case conflicts with the decisions of the majority of circuit courts to have addressed the issue of the standard of review of claims of exemption from disclosure pursuant to 26 U.S.C.A. § 6103(e)(7), thus increasing the existing conflict among the circuits. Moreover, the decision issued by the court of appeals is erroneous and fails to properly evaluate the important relationship between FOIA and section 6103.

I. The Application of 26 U.S.C.A. § 6103(e)(7) by the Fourth Circuit is in Conflict with the Majority of Circuit Courts to have Considered this Issue.

The proper standard of review to be applied to IRS claims of exemption from FOIA under section 6103 has been addressed by a number of the courts of appeals. Seven of the circuit courts have determined that claims of exemption under section 6103 are subject to de novo review. Specifically, the Third, Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have concluded that de novo review applies to the claim of exemption. See De Salvo v. Internal Revenue Service, 861 F.2d 1217, 1218-21 (10th Cir. 1988) (de novo review); Church of Scientology of Cal. v. Internal Revenue Service, 792 F.2d 146, 148-50 (D.C. Cir) (same), aff'd on a separate issue, 792 F.2d 153 (D.C. Cir. 1986) (en banc), aff'd 484 U.S. 9 (1987); Grasso v. Internal Revenue Service, 785 F.2d 70, 72-75 (3rd Cir. 1986) (same); Long v. United States, 742 F.2d

1173, 1177-78 (9th Cir. 1984) (same); Linsteadt v. Internal Revenue Service, 729 F.2d 998, 1001-03 (5th Cir. 1984) (same); Currie v. Internal Revenue Service, 704 F.2d 523, 526-28 (11th Cir. 1983) (same); Barney v. Internal Revenue Service, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) ("inclined to agree" that de novo review applies).

In contrast, only the First, Sixth, and Seventh Circuits have indicated that the appropriate standard of review for claims of exemption under section 6103 is arbitrary and capricious. See Aronson v. Internal Revenue Service, 973 F.2d 962, 965-66 (1st Cir. 1992) ("[R]eview must take place under deferential, administrative law standards.") White v. Internal Revenue Service, 707 F.2d 897, 900 (6th Cir. 1983) ("disposed to affirm .. on the basis" that section 6103 is self-governing); King v. Internal Revenue Service, 688 F.2d 488, 495-96 (7th Cir. 1982) (arbitrary and capricious review). However, by allowing the decision of the district court to stand, the Fourth Circuit has now joined the circuits requiring arbitrary and capricious review.*

As a result of this split among the courts of appeals, the standard for reviewing claims of exemption under section 6103 differs widely from circuit to circuit. Thus, a claim of exemption by the IRS might be reversed by a circuit relying on de novo review, yet the identical claim for exemption might be accepted in a

---

*Only the Second Circuit has failed to directly address this issue.

different circuit reviewing only for arbitrary and capricious behavior. Cf., e.g., Church of Scientology, 792 F.2d at 152-53 (circuit court, using de novo review, overruled decision of district court upholding exemption under arbitrary and capricious review). This unequal interpretation of the interaction between FOIA and section 6103 frustrates the expressed intent of Congress and impairs the broad--and uniform--application of FOIA.

II. The Decision of the Court of Appeals is Erroneous.

The court of appeals erred in affirming the decision of the district court because the district judge applied the arbitrary and capricious standard of review in upholding the IRS' refusal to disclose the information requested by Gibbs. See App. A-1 ("I conclude that the [IRS] did not act arbitrarily or in violation of law ....").
The framework of FOIA mandates de novo review of all claims of exemption from disclosure:

> [In a claim brought for the production of records] the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of [FOIA] ....

5 U.S.C.A. § 552(a)(4)(B) (emphasis added). One of these exemptions is 5 U.S.C.A. § 552(b)(3) ("exemption three"):

> [FOIA] does not apply to matters that are ... specifically exempted from disclosure by statute (other than [5 U.S.C.A. § 552b]) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Thus, claims of exemption based on statutes other than FOIA are subject to de novo review.

Section 6103 is precisely the type of statute contemplated by exemption three:

> Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

26 U.S.C.A § 6103(e)(7). That is, section 6103 refers to particular types of matters to be withheld from the public and establishes criteria to be used in evaluating the disclosure of such matters. See Long, 742 F.2d at

1178 ("Exemption 3 of FOIA was designed to give effect to just such explicit nondisclosure statutes as section 6103.") (footnote omitted). Consequently, claims of exemption under section 6103 must be reviewed de novo to determine whether the documents at issue may properly be withheld. See 5 U.S.C.A. § 552(a)(4)(B).

Some courts have concluded that section 6103 is a disclosure statute separate from FOIA. E.g., Aronson, 972 F.2d at 967. However, section 6103 is not a self-governing statute prescribing substantive and procedural rules governing the disclosure of IRS documents; rather, the statute narrowly focuses on exceptions from the prohibition of disclosure. See Church of Scientology of Cal., 792 F.2d at 149. Moreover, section 6103 contains no language indicating any intent to override FOIA, which would suggest a lack of intent to override the broad parameters of FOIA. In contrast, section 6110 of the Internal Revenue Code--which was enacted at the same time as section 6103 and is self-governing--states that its provisions are the "exclusive remedy" for the disclosure of IRS written determinations. 26 U.S.C.A. § 6110(l) (West Supp. 1997); see Church of Scientology of Cal., 792 F.2d at 148-50. In the absence of more explicit language, it is unreasonable to conclude that a narrow statute such as section 6103 overrules FOIA. See Church of Scientology of Cal., 792 F.2d at 149.

In this instance, the proper application of de novo review would have resulted in a rejection of the conclusory reasons given by the IRS for nondisclosure.

See Flesner Aff., App. A-8 to A-10. Because the affidavit merely asserts general principles of confidentiality and fails to demonstrate the particular reasons supporting a claim of exemption in this instance, it does not comply with this Court's precedent. See United States Dep't of Justice v. Landano, 508 U.S. 165, 174-78 (1993). If the district court had properly reviewed the affidavit de novo, it would have rejected the conclusory reasons proffered by the IRS and ordered disclosure of the documents at issue.

In sum, by affirming the decision of the district court, the court of appeals erroneously authorized arbitrary and capricious review of claims of exemption under section 6103. Based on the statutory language, the circuit court should have reversed the decision of the district court and ordered it to apply de novo review to the IRS claim of exemption.

III. The Question Presented is Important.

FOIA is an extremely important statute, designed to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). To advance this purpose, FOIA mandates "broad disclosure of Government records" unless an exemption from disclosure may validly be claimed by an agency. United States Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988) (internal quotation marks omitted). The Government has the

burden of justifying its claim of exemption from disclosure. 5 U.S.C.A § 552(a)(4)(B).

In light of the purposes of FOIA, the importance of de novo review is clear: without independent review of its decisions, an agency has no incentive to provide full disclosure of documents. This incentive is nowhere more important than in matters of taxation, where the authority of the IRS to review the private information of both individuals and corporations involves a tremendous potential for the arbitrary use of authority. If the incentive provided by de novo review is not present, there is an increased likelihood that the Government will act arbitrarily, confident that any wrongful actions will be shielded from view.

Finally, the issue of what standard of review applies to exemption three statutes has ramifications beyond the disclosure of tax documents. The courts have determined that many different laws qualify as an exemption three statute. See, e.g., Baldrige v. Shapiro, 455 U.S. 345 (1982) (13 U.S.C.A. §§ 8-9 (West 1990 & Supp. 1997)) (Census Act)); Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224 (1st Cir. 1994) (Fed. R. Crim. P. 6(e)) (grand jury); Virginia Sunshine Alliance v. Nuclear Regulatory Comm'n, 509 F.Supp. 863 (D. D.C.), aff'd 669 F.2d 788 (D.C. 1981) (42 U.S.C.A. § 2167 (West 1994)) (Atomic Energy Act of 1954, § 147). Thus, a determination that de novo review does not apply to claims of exemption under section 6103 will cause the adoption of erroneous standards of review in some courts in matters other than taxation, resulting in other circuit splits regarding the

standard of review. This will result in restriction of the broad disclosure requirements of FOIA and frustration of the Congressional intent embodied in the Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Erik P. Doerring
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

Attorney for Petitioner

January 26, 1998